[the] contract terms was based upon substantial extrinsic evidence and is not subject to *de novo* review." However, the extrinsic evidence relied upon by the state consists of county employee testimony acknowledging that the 1990 standard contracts placed the risk on the providers if the utilization of services was greater than anticipated and that this would serve to limit San Diego's contractual liability. This testimony does not support that the risk borne by the providers pertained to the risk of insufficient state funds to meet the estimated reimbursement pool amounts. In any event, any such testimony would have been inadmissible to alter the plain meaning of the relevant contracting provisions. (See *Franklin v. USX Corp.* (2001) 87 Cal.App.4th 615, 621.)

Moreover, even assuming the health care providers agreed to bear the risk of a shortage of funds to fund the reimbursement pools, the contracts expressly stated that the health care providers had the right to cancel the contracts "if funds for the CMS Program are significantly reduced or not received" and that this termination right included the ability to cancel the contract if San Diego's ability to fund the agreement from property tax administration fees is challenged or repealed. Given these termination provisions, San Diego could not have refused to fund the reimbursement pools at the estimated levels and continue to satisfy its state mandate to provide health care for MIP's. This is particularly true given that by May 1991, San Diego was under a court order to continue to provide CMS program services.

The state argues that the authority to terminate is immaterial because "none of the providers terminated their agreements in 1990-1991." This argument is unavailing because the issue here is whether the providers could terminate the contracts if the

reimbursement pools were not funded at the estimated levels. If the providers could terminate the contracts, San Diego did not act unreasonably in preventing a threatened termination by using its own funds to ensure the pools were properly funded, particularly in light of the May 1991 preliminary injunction order.

The state's reliance on the events of the subsequent fiscal year is also misplaced. The state argues that because the medical providers agreed for the 1991/1992 year to accept a much lower reimbursement rate during that fiscal year, this supports an inference that San Diego could have refused to fund the reimbursement pools at the estimated levels in the prior year. The undisputed evidence establishes that the providers agreed to a much lower rate in the 1991/1992 contracts only in exchange for San Diego's agreement that it would reimburse the hospitals from the results of this litigation. Because the circumstances of fiscal year 1991/1992 were different from fiscal year 1990/1991, it would not be reasonable to assume that because San Diego was able to cap the pool allocations at a much lower rate in the 1991/1992 fiscal year, it had the discretion or ability to do so in the previous year.

In seeking to uphold its conclusion in this appellate proceeding, the Commission argues that section 6 "requires reimbursement only when the state mandates a new program that results in *actual, increased costs* to the local government." We agree with this principle. (See *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283-1285 (*County of Sonoma*); *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 984-985.) However, as we noted at the outset of this section, the argument that San Diego is not entitled to

reimbursement because it shifted the risk to contract providers assumes that San Diego in fact *incurred* the costs and is premised on the assertion that the costs were *not reasonable* because San Diego was not compelled to pay the costs under the relevant contracts.

We conclude the Commission's determination that San Diego's claim must be denied in its entirety because San Diego shifted the risk of inadequate state funding to private medical providers is unsupported factually and legally.

III. *Evidentiary Support for Claimed Amount*

Respondents alternatively suggest that the Commission's decision may be affirmed on the basis that San Diego failed to present credible evidence that it did in fact incur the claimed costs.

Under the applicable statutes, San Diego had the burden of proving it incurred its claimed costs of approximately $40.8 million to fund adult MIP health care services. (See Evid. Code, § 500.) To meet this burden, San Diego presented the testimony of its own employees and employees of its contract administrator (Medicus) and documentary evidence in the form of declarations, patient information, and copies of cancelled checks. The funds paid to the reimbursement pools were primarily evidenced by draw requests from Medicus, and by a Medicus financial director's declaration stating that Medicus deposited the payments received from the county into its account and then disbursed *all* of these amounts to the health care providers.

The state argued that this evidence was deficient because the supporting documents regarding draw requests from Medicus related to funding rather than actual expenditures and that San Diego destroyed numerous back-up records before the state

could perform an audit of the claim. According to the state's evidence, San Diego produced only a 57-page packet and a memorandum stating no other records were available, and San Diego engaged in numerous actions that hindered review of the claim, including intentionally destroying relevant documents. Based on this evidence, the state argued San Diego could not substantiate its claim of an unfunded mandate, and therefore the Commission should deny the claim.

If the Commission had agreed with the state that San Diego's proof was insufficient or not credible, we would be bound by that factual conclusion. (See Gov. Code, § 17559.) However, on our review of the statement of decision, it appears the Commission did not ultimately determine there was an inadequacy of proof and instead it based its conclusion on the other grounds asserted for denying the claim (risk-shifting and commingling of CHIP funds). The Commission stated, for example, that:

> "At the hearing, the County produced voluminous records, including cancelled checks, purporting to support its claim of CMS Program expenditures in the sum of $41M. The evident animosity between the County and State functioned to clearly impede the audit, impair candor, and limit communication. The effect circumscribed this tribunal's ability to fully and competently determine the scope of the County's CMS Program. Each party now concedes the value of an audit, however the County suggests an independent audit to which the Attorney General objects. While the Attorney General invites this tribunal's recommendation to the Commission on State Mandates for an audit — the invitation is declined. *The CMS Program expenditures as relevant to the administered reimbursement pools are not dispositive to the County's 1990-1991 claim.*" (Italics added.)

We interpret the Commission's statement that San Diego's program expenditures are "not dispositive" to San Diego's claim to mean the Commission did not necessarily adopt the

state's arguments that the claim should be denied because of inadequate proof. Consistent with this interpretation, in several other portions of the statement of decision, the Commission characterized San Diego's evidence in support of its claim as "competent and credible."

In reaching our conclusion that the Commission did not reject San Diego's claim based on the adequacy of its proof, we recognize the statement of decision contains various assertions that could be interpreted as finding that San Diego did not properly document its claim. However, when viewed in context of the entire statement of decision, these assertions do not reflect that the Commission reached this conclusion. If the Commission had intended to base its decision on the lack of adequate evidence to support San Diego's claim, it would have been a very simple matter for the Commission to state this in its statement of decision. It did not do so. Implicitly recognizing this, respondents do not expressly urge us to uphold the decision based solely on a finding that San Diego failed to present credible evidence to support that it incurred the claimed costs. Instead, both the state and the Commission raise this argument primarily in connection with the CHIP "commingling" issue (which will be discussed below).

If a court or an administrative agency does not resolve a particular factual issue, it is not proper for an appellate court to affirm merely because there was substantial evidence upon which the agency or court might have ruled against the appellant. (See *Estate of Larson* (1980) 106 Cal.App.3d 560, 567.) Thus, we cannot affirm the Commission's decision merely because there was evidence in the record from which the Commission could have found San Diego's evidence was not credible.

IV. *Credit for CHIP Funds*

Respondents next argue the Commission's decision denying San Diego's claim was proper based on the undisputed evidence that San Diego received $18,942,077 in CHIP funds from the state and the evidence showing that San Diego commingled the MISA and CHIP funds spent on the CMS program. San Diego counters that the state is not entitled to an offset for CHIP funds because these funds can be used only to "[s]upplement" county programs, and, alternatively, even if the state is entitled to a credit for those funds, San Diego would still be entitled to recover some or all of its claim.

For the reasons explained below, we agree with respondents that the state is entitled to a full credit for the CHIP funds used to pay for CMS program services during the 1990/1991 fiscal year. However, this conclusion does not support affirming the Commission's conclusion that San Diego did not incur *any* costs in excess of the funds provided by the state. Instead, as detailed below, we determine the Commission's factual findings establish that San Diego proved it spent $3,455,754 in excess of MISA and CHIP funds provided by the state for adult MIP's health care services.

A. *The State is Entitled to a Credit for CHIP Funds*

In 1989, the Legislature established the CHIP program to implement Proposition 99, which increased the tax on tobacco products to pay for various programs, including health care for indigent persons. (*Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 254; see *County of San Diego, supra,* 15 Cal.4th at p. 107.) Under the CHIP program, a county was entitled to apply for funds based on an assurance that it would comply with applicable provisions governing the use of the funds. (*County of San*

Diego, supra, 15 Cal.4th at p. 107.) The Legislature intended "that [the CHIP] funds appropriated . . . be administered, to the extent possible, in the same manner and according to the same conditions and requirements as funds appropriated pursuant to . . . [the MISA legislation]." (Former Welf. & Inst. Code, § 16942, added by Stats. 1989, ch. 1331, § 9, p. 5420, eff. Oct. 2, 1989.)

It is undisputed that San Diego received $18,942,077 in CHIP funds from the state. San Diego acknowledges it used these funds in the CMS program and that the eligibility requirements for use of the funds were the same as the MISA eligibility requirements. Further, the evidence showed that most of the CHIP and MISA funds were commingled once they were transferred to the CMS program administrator.

A local entity is entitled to reimbursement under section 6 only to the extent it uses its own tax revenues to pay for the state mandate. The purpose of section 6 is to "prevent the state from forcing extra programs on local governments in a manner that negates their careful budgeting of expenditures. A forced program that would negate such planning is one that results in increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit." (*County of Sonoma, supra,* 84 Cal.App.4th at p. 1284.) Thus, "[n]o state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes." (*Redevelopment Agency v. Commission on State Mandates, supra,* 55 Cal.App.4th at p. 987.) "Section 6 'requires subvention only when the costs in question can be recovered *solely from tax revenues.*'" (*Ibid.*)

Under these principles, San Diego is not entitled to recover costs to the extent that those costs were paid for by CHIP funds and for which San Diego did not use its own tax proceeds. In urging us to reach a contrary conclusion, San Diego maintains that the state was not entitled to a credit because, under Revenue and Taxation Code section 30125, "'CHIP money had to 'be used to *supplement* existing levels of services and *not to fund* existing levels of service.'" Assuming, without deciding, that under this code section CHIP funds could not be validly used to pay for services that were already required, and that instead the funds could only be used to provide *additional* services to the adult MIP population, this conclusion does not mean that the state was not entitled to a credit for the CHIP funds under the circumstances of this case.

The issue here is not whether the CHIP funds were used in strict accordance with the applicable statutes, but how the CHIP funds were in fact used. It was undisputed that the medical services provided under San Diego's CMS program met, *but did not exceed*, the applicable standards of care. San Diego further acknowledged that at least $15.1 million of CHIP funds were used to pay for the CMS program. Thus, if CHIP funds were used in this program, these funds necessarily were used to pay for "medically necessary care" and not for any additional care. Accordingly, although the CHIP legislation may have mandated San Diego to provide care in addition to that provided by the CMS program, the critical factor here is that San Diego did not establish that it did so. Because San Diego did not show that it used the CHIP funds to provide CMS services that exceeded the statutory standard of care, we reject San Diego's argument that the state

cannot be credited with the use of these CHIP funds because San Diego now believes the funds should have been used in this manner.

B. *Amount of CHIP Funds Credit to Which State Is Entitled*

The next issue is the amount of CHIP funds credit to which the state is entitled, and whether this credit, when added to the $25,799,190 (in MISA and other related funds) that San Diego agrees it received from the state, is equal to or greater than the amount of funds expended by San Diego on its CMS program.

1. *Contention that CHIP Funding was Greater Than Net Costs is Unsupported*

The state argues that because it is undisputed that San Diego received $18,942,077 in CHIP funds and the Commission determined that San Diego's net claim for reimbursement equaled approximately $15 million, the Commission was correct in determining that San Diego could not prevail on its claim.

The fundamental problem with this argument is that the Commission expressly recognized, in footnotes 33 and 34 of its statement of decision, that San Diego's $15 million net claim did not include an additional $7,365,837 that San Diego claims to have spent for CMS professional services (to fund the hospital pool and the specialty pool), and that San Diego was not seeking reimbursement for these costs because San Diego acknowledged it used the $7,365,837 in CHIP funds for this purpose. Because the Commission made the express finding that the $7,365,837 in CHIP funds was used in the CMS program but that San Diego was not seeking reimbursement for these particular costs, it is necessary to subtract the $7,365,837 from the CHIP funds received in order to determine the proper state credit for the CHIP funds.

The state next argues that even if the $7,365,837 is subtracted from the total amount of CHIP funds given to San Diego ($18,942,077), the resulting amount ($11,576,240) is greater than the amount of San Diego's claim after the Commission reduced San Diego's claim to $9,891,895. We reject this contention because we find that the Commission erred in several respects in reducing the claim.

To properly explain our conclusion, it is necessary to describe the Commission's factual and legal conclusions concerning reductions to which it found the state was entitled against San Diego's $40,831,184 claim.

The Commission first identified the components of San Diego's claim as follows: $36,254,278 in direct CMS program costs; plus $1,632,554 in indirect program costs; plus $2,944,352 in other costs (the main component of which was mental health costs). The Commission then found (as stipulated by the parties) that San Diego received $25,799,190 from the state, which consisted of $19,842,347 in state MISA funds; $3,462,889 in hold harmless funds; $2,199,951 in SLIAG funds; and $294,003 in interest earned on the MISA funds. Thus, San Diego's net claim for reimbursement was $15,031,994 ($40,831,184 minus $25,799,190).

However, the Commission determined that this net reimbursement claim must be reduced because two components of the claim were not recoverable: (1) $2,658,326 in CMS funds spent on mental health services; and (2) $9,713 in expenses paid to Medicus. The Commission also determined that San Diego failed to give the state credit for several additional items: (1) $1,398,310 in SLIAG funds; (2) $424,096 in a surplus of funds paid to Medicus from the prior year; and (3) $657,654 in "[u]naccounted (but disbursed) CHIP

funds." After subtracting the items of San Diego's claim that the Commission found nonrecoverable and taking into account the three additional credits, the Commission concluded that the proper amount of San Diego's reimbursement claim was $9,891,895.[7]

As explained below, we determine the Commission erred in reaching several of these conclusions regarding credits and proper deductions from San Diego's claim. In reaching these determinations, we are mindful of the Commission's broad expertise in the area of unfunded state mandates and in determining the validity of claims incurred to pay for an unfunded mandate. (See *Hayes v. Commission on State Mandates, supra,* 11 Cal.App.4th at pp. 1596-1597.) We therefore give substantial deference to the Commission's conclusions. However, we cannot affirm a factual conclusion to the extent it is not supported by any evidence in the record. Further, we are not required to defer to the Commission to the extent that its decision is based on an improper construction of applicable law.

2. *Commission's Findings Regarding Additional Credits to Which the State is Entitled*

a. *Credit of $1,398,310 in SLIAG Funding*

For the 1990/1991 fiscal year, San Diego applied for and received federal grant money through the state to mitigate the effects of a 1996 federal immigration law. These funds were received through the State Legalization Impact Assistance Grant program

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7 Based on the Commission's identified amounts, this $9,891,895 figure is $8,000 greater than it should be. This calculation error apparently arose because of a subtraction mistake contained in footnote 46 of the statement of decision. The calculation error, however, has no effect on our ultimate conclusion.

(SLIAG). The total SLIAG funds received by the county for 1990/1991 was $3,598,261. Of this amount, San Diego used $2,199,951 in the CMS program, and the remaining funds ($1,398,310) were used for non-CMS purposes (e.g., county patient support, primary care services, and immigration health services). Before it received the SLIAG funds, San Diego was required to provide documentation specifying the program for which it was requesting reimbursement.

Based on this undisputed evidence, San Diego credited the state with the SLIAG funds used in the CMS program ($2,199,951). The Commission found, however, that the state was additionally entitled to be credited with SLIAG funds that were *not* used in the CMS program ($1,398,310). The Commission's statement of decision does not explain why the Commission credited the state with the funds used for non-CMS purposes, nor can we conceive of a justifiable rationale for the reduction. If, as the Commission expressly found, the funds were not used for CMS purposes, there is no basis for reducing the state's obligation to pay for CMS services in this amount. This is particularly true because if San Diego had not claimed costs for the non-CMS programs, it would not have received the additional $1,398,310 in SLIAG funding.

The state attempts to justify the Commission's action by arguing that the SLIAG "funds were deleted from the County's calculation of its claim because the County did not demonstrate to the satisfaction of the Commission that . . . it could not have spent the entire SLIAG allocation in the CMS program." However, what San Diego could have done with the SLIAG money is not the issue. The issue is whether San Diego expended its own costs to pay for an unfunded mandate. Because San Diego did not use the

remaining SLIAG funds for the CMS program and instead was required to use the funds for non-CMS purposes, the state is not entitled to a credit for these funds.

b. *Medicus Credit of $424,096*

San Diego further challenges the Commission's decision that the state was entitled to a $424,096 "Medicus credit." This credit reflects the approximate difference between the 1989/1990 Medicus funding ($7.3 million) and the 1989/1990 Medicus expenses ($6.9 million) as set forth on an undated computer printout of a Medicus income statement. Even assuming this statement shows that in the 1989/1990 fiscal year a surplus existed pertaining to funds paid to Medicus, this does not support that these surplus funds were used in the next fiscal year. To properly permit a credit, there must have been some evidence that the funds in fact were carried over to the next year.

The state does not suggest that it produced any evidence that the 1989/1990 surplus was used to pay for expenses in the next fiscal year. Instead, it merely argues that the existence of the surplus was "additional evidence of the County's failure to show that all draw requests were required and accounted for . . . [and] supports the Commission's finding that there is no evidence that the County spent all program revenues in support the fiscal year 1990-91 program or that it was required to spend these funds for the program." However, the fact that the surplus could be used as evidence that the County's claims in the next fiscal year were not credible is a very different conclusion than stating that a prior year's surplus should be used as a credit to the state in the next fiscal year. This conclusion is not reasonable without any evidence supporting that the surplus was transferred to the next year.

c. "*Unaccounted*" *CHIP Funds*

The Commission also subtracted from San Diego's claim $657,654 which the Commission stated reflected "unaccounted (but disbursed) CHIP funds." Given our holding that the state is entitled to full credit for all of the CHIP funds used to pay for the 1990/1991 CMS program, to avoid double-counting of the CHIP credit this additional amount should no longer be subtracted from San Diego's claim.

3. *Commission's Findings Regarding Deductions From San Diego's Claim*

a. *Mental Health Expenses*

As part of its claim, San Diego sought costs incurred for mental health care for adult MIP's. The Commission made a factual finding that San Diego presented "competent and credible evidence" establishing that the county expended $2,658,326 of its CMS funding through its mental health department. The Commission, however, found that San Diego could not recover this amount because "no statutory mandate existed that compelled" the diversion of CMS funds to its mental health department.

San Diego challenges the legal basis for this conclusion.

In *County of San Diego, supra*, 15 Cal.4th 68, the California Supreme Court held the 1982 legislation removing adult MIP's from Medi-Cal coverage mandated a "'new program'" or "'higher level of service'" within the meaning of section 6, by compelling counties to accept financial responsibility for the health care for adult MIP's. (*Id.* at p. 75.) This holding is equally applicable to adult MIP's mental health services. Before the 1982 legislation, the state, under the Medi-Cal program, paid for 100 percent of the costs for necessary mental health services for adult MIP's, but after the 1982 legislation, the

health services under the Short-Doyle Act, and not any amounts over that required percentage.

In addition to its legal argument, the state contends the Commission properly deleted the mental health claim because there was no evidence that the amounts paid reflected the actual costs of mental health services. The state argues that the $2.6 million was instead merely a "voluntary" amount paid by the CMS program administrators to the county mental health department. However, if San Diego was required to pay for a portion of adult MIP mental health care costs, there is no basis for finding these payments were voluntary. Contrary to the state's arguments, the fact the costs were not paid directly by the CMS program, and instead were paid through the county mental health department as a matter of administrative convenience, has no effect on the state's obligation to repay the amounts.

We likewise reject the state's argument that we may affirm the Commission's decision because there was a surplus of mental health funds in 1990. The Commission expressly rejected this argument, stating that it would be "reluctant to determine that a county must exhaust its fiscal surplus when seeking reimbursement" for the incurred mental health costs. We agree with this conclusion. The existence of a surplus does not diminish the state's obligations to pay for an unfunded mandate where, as here, there was no evidence that any such surplus was, or could have been, used to pay for the mental health costs at issue.

b. *$9,713 Credit for Medicus Payment*

The Commission reduced San Diego's claim by $9,713, finding "competent and credible evidence" established that Medicus expended only $32,220,148 but that San Diego claimed $32,229,861. However, as the state recognizes, the Commission's conclusion was a computational error because San Diego had already subtracted this amount from its claim.

C. *Summary of CHIP Funding Issue*

To summarize our conclusion regarding the CHIP funding issue, we determine the state was entitled to be credited with the amount of CHIP funds used for CMS services. We conclude, however, the administrative record does not support that the total amount of funds received from the state for the CMS program was more than the total amount that San Diego spent on the CMS program. With respect to this conclusion, the Commission's findings, as supported by the record, establish the following:

- San Diego spent a total of $40,831,184 in health care costs for adult MIP's.
- The state is entitled to a credit of $25,799,190, which consists of $19,842,347 in state MISA funds, $3,462,889 in hold harmless funds, $2,199,951 in SLIAG funds, and $294,003 in interest earned on the MISA funds.
- The state is entitled to an additional credit of $11,576,240, which consists of the total amount of CHIP funds received by San Diego ($18,942,077) minus the amount of CHIP funds that were used for services that were not included in San Diego's claim ($7,365,837).